

1 Joseph W. Cotchett (36324)
jcotchett@cpmlegal.com
2 Pete N. McCloskey (024541)
pmccloskey@cpmlegal.com
3 Steven N. Williams (175489)
swilliams@cpmlegal.com
4 **COTCHETT, PITRE & McCARTHY**
5 San Francisco Airport Office Center
6 840 Malcolm Road, Suite 200
7 Burlingame, CA 94010
8 Telephone: (650) 697-6000
9 Facsimile: (650) 697-0577

10 Michael P. Lehmann (77152)
11 mlehmann@hausfeldllp.com
12 Christopher Lebsock (184546)
13 clebsock@hausfeldllp.com
14 **HAUSFELD LLP**
15 44 Montgomery Street
16 San Francisco, CA 94111
17 Telephone: (415) 633-1908
18 Facsimile: (415) 358-4980

19 Michael D. Hausfeld
mhausfeld@hausfeldllp.com
20 Seth R. Gassman
sgassman@hausfeldllp.com
21 **HAUSFELD LLP**
22 1700 K Street, Suite 650
23 Washington, D.C. 20006
24 Telephone: (202) 540-7200
25 Facsimile: (202) 540-7201

26 *Interim Co-Lead Counsel for Plaintiffs*

27 **UNITED STATES DISTRICT COURT**
28 **NORTHERN DISTRICT OF CALIFORNIA**
29 **SAN FRANCISCO DIVISION**

30 **IN RE TRANSPACIFIC PASSENGER**
31 **AIR TRANSPORTATION**
32 **ANTITRUST LITIGATION**

33 Civil Case No. 3:07-CV-05634-CRB
34 MDL 1913

35 **This Document Relates To:**

36 **All Actions**

37 **PLAINTIFFS' NOTICE OF MOTION AND**
38 **MOTION FOR PRELIMINARY APPROVAL**
39 **OF SETTLEMENTS WITH DEFENDANTS**
40 **JAPAN AIRLINES INTERNATIONAL**
41 **COMPANY, LTD; SOCIETE AIR FRANCE;**
42 **VIETNAM AIRLINES COMPANY, LTD;**
43 **THAI AIRWAYS INTERNATIONAL PUBLIC**
44 **COMPANY, LTD; AND MALAYSIAN**
45 **AIRLINE SYSTEMS BERHAD; AND**
46 **MEMORANDUM IN SUPPORT THEREOF**

47 Hearing Date: Friday, August 8, 2014
48 Judge: Hon. Charles R. Breyer
49 Time: 10:00 a.m.
50 Courtroom: 6, 17th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Friday, August 8, 2014, 2014 at 10:00 a.m., before the Honorable Charles R. Breyer, United States District Court for the Northern District of California, 450 Golden Gate Ave., Courtroom 6, 17th Floor, San Francisco, California, Plaintiffs will move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for entry of an Order:

1. Granting preliminary approval of the settlement agreements (“Settlements”) Plaintiffs have executed with Defendants (1) Japan Airlines International Company, Ltd.; (2) Societe Air France; (3) Vietnam Airlines Company Limited; (4) Thai Airways International Public Co., Ltd.; and (5) Malaysian Airline System Berhad;
2. Certifying the Settlement Classes;
3. Appointing Plaintiffs’ Interim Lead Counsel as Settlement Class Counsel and named Plaintiffs to serve as Class Representatives on behalf of the Settlement Classes; and
4. Provisionally establishing a litigation expense fund in the amount of \$3 million to reimburse Plaintiffs for litigation expenses incurred to date and pay for litigation expenses that will be incurred in the future.

The motion should be granted because the proposed Class Settlements are within the range of reasonableness. The motion is based on this (i) Notice of Motion and Motion, (ii) the supporting Memorandum and Points and Authorities, (iii) the accompanying Declaration of Christopher L. Lebsock, (iv) the Class Settlement Agreements with Defendants (a) Japan Airlines International Company, Ltd, (b)Societe Air France, (c) Vietnam Airlines Company Limited, (d) Thai Airways International Public Company, Ltd., (e) and Malaysian Airline System Berhad (the “Settlement Agreements”), (v) any further papers filed in support of this Motion, (vi) the argument of counsel, and (vii) all pleadings and records on file in this matter.

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7 **Rules**

8	Fed. R. Civ. P. 23	<i>passim</i>
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10	C.A. Wright, A. R. Miller & M.K. Kane, <i>Federal Practice and Procedure: Civil Procedure</i> § 1781 (3d ed. 2004)	12
11	H.B. Newberg, <i>NEWBERG ON CLASS ACTIONS</i> , § 11.25 (4th ed. 2002)	5
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STATEMENT OF ISSUES TO BE DECIDED

1. Whether the proposed Settlement Agreements fall within the “range of possible approval,” and should, therefore, be preliminarily approved by the Court?

2. Whether the proposed Settlement Classes meet the requirements of Federal Rule of Civil Procedure 23(a) and (b), and should be provisionally certified for settlement purposes?

3. Whether Plaintiffs' Interim Lead Counsel should be appointed as Settlement Class Counsel and named Plaintiffs appointed as Class Representatives on behalf of the Settlement Classes?

4. Whether there is cause to provisionally establish a litigation expense fund and the proper amount of such fund that should be provisionally established by the Court?

SUMMARY OF ARGUMENT

The Court should preliminarily approve the Settlements set forth more fully below because they are within the range of possible approval and justify giving notice to the Class members and holding a fairness hearing. The Settlements are the result of informed and contested negotiations, and are fair, reasonable, and adequate. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The monetary recovery for the class is significant, and the cooperation agreements greatly strengthen Plaintiffs' case against the non-Settling Defendants.

Applying Rule 23 of the Federal Rules of Civil Procedure, the Court should certify the Classes for purposes of settlement. Here, Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy are met. *See e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010); *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Likewise Rule 23(b) is satisfied because common questions predominate and a class action is superior to pursuing numerous individual cases. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 615 (N.D. Cal. 2009); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006).

Finally, under Rule 23(g), class certification requires that the Court appoint class counsel. Based on their experience and vigorous prosecution of this action, Interim Co-Lead Counsel, Cotchett, Pitre & McCarthy and Hausfeld LLP, should be appointed as Settlement Class Counsel for purposes of these Settlements, and named Plaintiffs should be appointed as Class Representatives for the Settlement Classes.

MEMORANDUM AND POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs hereby move this Court for an order preliminarily approving class action Settlements reached with Defendants Japan Airlines International Company, Ltd (“JAL”), Societe Air France (“Air France”), Vietnam Airlines Company, Ltd (“VN”), Thai Airways International Public Company, Ltd (“Thai Airways”), and Malaysian Airline System Berhad (“Malaysian Air”) (collectively, “Settling Defendants”).

Copies of the Settlement Agreements are attached to the Declaration of Christopher L. Lebsock (“Lebsock Decl.”), as Exhibits 1 through 5, respectively. These Settlements resolve all claims brought by Plaintiffs against Settling Defendants, who will pay a combined \$22,252,000, and have each agreed to cooperate with Plaintiffs’ by providing information related to the existence, scope, and implementation of the conspiracy alleged in the Second Amended Consolidated Class Action Complaint (“SAC”). Lebsock Decl. ¶¶ 19, 20.¹

These Settlements are within the range of possible approval and in the best interests of all Class members. Accordingly, Plaintiffs seek an order: preliminarily approving the Settlement Agreements, provisionally certifying the Settlement Classes, and appointing Plaintiffs' Interim Co-Lead Counsel as Settlement Class Counsel and named plaintiffs as Class Representatives.² Plaintiffs also request creation of a litigation expense fund.

II. SETTLEMENT NEGOTIATIONS

Plaintiffs' Interim Co-Lead Counsel ("Class Counsel") and counsel for each Settling Defendant engaged in extensive arm's length negotiations before reaching these Settlements. *See Lebscock Decl.* ¶¶ 3-21 (describing negotiation scope and details). Class Counsel and defense counsel, all experienced and skilled attorneys, vigorously advocated their respective clients' positions. Initial negotiations beginning in 2008 and continuing through 2013, were conducted via telephone conferences, in-person meetings, and written correspondence. Lebscock Decl. ¶ 21. The first Settlement, with JAL, was reached with the assistance of a mediator. *Id.* ¶¶

¹ Plaintiffs presently intend to move for preliminary approval of at least one additional settlement before seeking an order on notice. The parties to this additional agreement are working as quickly as possible to have it finalized.

² Plaintiffs will submit a proposed notice plan to the Court in the near future.

1 3, 21.

2 Before each subsequent Settlement was reached, Plaintiffs spent significant time
 3 investigating the claims against each Settling Defendant, including through numerous proffer
 4 sessions with JAL. Class Counsel thus had significant knowledge of Defendants' conspiratorial
 5 conduct and the strengths and weaknesses of Plaintiffs' claims and Defendants' asserted
 6 defenses. Class Counsel used the extensive JAL proffer, as well as other discovery materials, to
 7 evaluate each Settling Defendant's position and negotiate a fair settlement. *Id.* ¶¶ 6, 9, 12, 15, 18.
 8 Class Counsel believe these Settlements, including over \$22 million in recovery and extensive
 9 cooperation obligations that will assist the proposed Classes in prosecuting this action, are fair,
 10 reasonable, and adequate to the Classes. Plaintiffs respectfully submit that these Settlements are
 11 in the best interests of the Classes, and should be preliminarily approved by the Court.

12 **III. THE SETTLEMENT AGREEMENTS**

13 The proposed Settlement Agreements resolve all claims against Settling Defendants in
 14 the alleged conspiracy to fix or stabilize prices for air passenger travel, including associated
 15 surcharges, for international flights involving at least one flight segment between the United
 16 States and Asia/Oceania. The Classes will receive \$22,252,000 and significant cooperation.

17 *See Lebsock Decl.* ¶¶ 19, 20, Exs. 1-5. The terms of the Agreements are outlined below.

18 **A. The Settlement Classes**

19 The proposed Settlement Classes (collectively referred to as the "Settlement
 20 Classes") are defined as follows:

21 **JAL SETTLEMENT CLASS:**

22 All persons and entities that purchased passenger air transportation that included
 23 at least one flight segment between the United States and Asia or Oceania from
 24 Defendants, or any predecessor, subsidiary, or affiliate thereof, at any time
 25 between January 1, 2000 and the Effective Date. Excluded from the class are
 26 purchasers of passenger air transportation directly between the United States and
 27 the Republic of Korea purchased from Korea Air Lines, Ltd. and/or Asiana
 28 Airlines, Inc. Also excluded from the class are governmental entities, Defendants,
 any parent, subsidiary, or affiliate thereof, and Defendants' officers, directors,
 employees and immediate families.³

³ *See Lebsock Decl.*, Ex. 1, ¶ 3 (Amended JAL Settlement Agreement).

1 AIR FRANCE/VN SETTLEMENT CLASS:

2 All persons and entities that purchased passenger air transportation that included
 3 at least one flight segment between the United States and Asia or Oceania from
 4 Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate
 5 thereof, at any time between January 1, 2000 and the Effective Date. Excluded
 6 from the class are purchases of passenger air transportation between the United
 7 States and the Republic of South Korea purchased from Korea Air Lines, Ltd. and
 8 /or Asiana Airlines, Inc. Also excluded from the class are governmental entities,
 9 Defendants, former defendants in the Actions, any parent, subsidiary, or affiliate
 10 thereof, and Defendants' officers, directors, employees and immediate families.⁴

9 THAI AIRWAYS SETTLEMENT CLASS:

10 All persons and entities that purchased passenger air transportation that included
 11 at least one flight segment between the United States and Asia or Oceania from
 12 Defendants, or any predecessor, subsidiary or affiliate thereof, at any time
 13 between January 1, 2000 and the Effective Date.⁵

14 MALAYSIAN AIR SETTLEMENT CLASS:

15 All persons and entities that purchased passenger air transportation that included
 16 at least one flight segment between the United States and Asia/Oceania from
 17 Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate
 18 thereof, at any time between January 1, 2000 and the Effective Date.⁶

19 Excluded from the Settlement Classes are governmental entities, Defendants, former
 20 Defendants, any parent, subsidiary, or affiliate thereof, and Defendants' officers, directors,
 21 employees, and immediate families. The Settlement Classes (excepting the Thai Airways
 22 Settlement Class)⁷ also exclude purchases of air passenger tickets between the United States
 23 and the Republic of South Korea purchased from either Korean Air Lines, Ltd, or Asiana
 24 Airlines, Inc.

25 **B. Consideration Provided by the Settlement Agreements**

26 Together, the Settling Defendants agreed to pay \$22,252,000, with JAL paying \$10

27 ⁴ See Lebsack Decl. Ex. 2, ¶ 3(Amended Air France Settlement Agreement); Ex. 3, ¶ 3 (Amended VN Settlement
 28 Agreement) .

⁵ See Lebsack Decl. Ex. 4, ¶ 3 (Thai Airways Settlement Agreement).

⁶ See Lebsack Decl. Ex. 5 ¶ 3 (Malaysian Air Settlement Agreement).

⁷ The Thai Airways settlement does not include purchases from Korean Air Lines, Ltd. or Asiana Airlines, Inc. in
 the class definition. Thus, in practical effect, none of the settlements include purchases from these two airlines in
 the class definition. Both airlines settled their antitrust exposure in a related proceeding pending in the Central
 District of California.

1 million, Air France paying \$867,000, VN paying \$735,000, Thai Airways paying \$9,700,000
 2 million, and Malaysian Air paying \$950,000. Lebsock Decl. ¶ 19. The Settlements also confer
 3 significant non-monetary benefits. Each Settling Defendant has agreed to cooperate with
 4 Plaintiffs in the prosecution of this action by providing information relating to Plaintiffs'
 5 allegations, including through (1) attorney proffers; (2) interviews of persons with knowledge
 6 regarding the conspiratorial conduct alleged in Plaintiffs' SAC; (3) the production of relevant
 7 documents, including assistance in establishing the admissibility of the documents produced;
 8 and (4) for all settlements other than with Malaysian Air, one or more witnesses to establish the
 9 foundation of documents or data necessary for summary judgment and trial. *Id.* ¶ 20.

10 For example, the JAL Settlement Agreement provides that JAL will make up to four
 11 employees available to provide declarations concerning factual matters asserted in summary
 12 judgment motions, and provide up to 40 hours of attorney proffer time – something Interim
 13 Co-Lead Counsel has already availed itself of in prosecuting this action. *See* Ex. 1 ¶ 13.1;
 14 *see also* Ex. 2 ¶ 14.1 (two employees made available and up to three meetings for attorney
 15 proffers); Ex. 3 ¶ 14.1 (same); Ex. 4 ¶ 15.1 (three employees made available and up to three
 16 meetings for attorney proffers); and Ex. 5 ¶ 14.1 (two employees made available). These
 17 cooperation clauses are a substantial benefit to the Settlement Classes.

18 C. Releases for the Settling Defendants

19 Plaintiffs agreed to release Malaysian Air, VN, Thai Airways, and Air France from all
 20 claims arising from or relating to the pricing of passenger air transportation between the United
 21 States and Asia/Oceania to the extent that the travel originated in the United States with respect
 22 to the pricing of fuel surcharges or any other element or component of pricing that were or
 23 could have been alleged in the Consolidated Class Action Complaints. Ex. 2 ¶¶ 1.10, 9.1; Ex.
 24 3 ¶¶ 1.10, 9.1; Ex. 4 ¶¶ 1.16, 9.1; Ex. 5 ¶¶ 1.10, 9.1. The release provided to JAL is broader in
 25 that it is not limited to U.S. originating travel. Ex. 1 ¶¶ 1.11, 2, 8.1.

26 The Settlement Agreements specifically preserve Settlement Class members' rights
 27 against any co-conspirator or non-Settling Defendant. Ex. 1 ¶ 9; Ex. 2 ¶ 10; Ex. 3 ¶ 10; Ex. 4
 28 ¶ 10; Ex. 5 ¶ 10. Furthermore, the sales of passenger air transportation by Settling

1 Defendants remain in the case as a potential basis for damage claims and shall be part of
 2 any joint and several liability claims against the non-settling Defendants.

3 **IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENTS**

4 **A. Class Action Settlement Procedure**

5 Proposed class action settlements must be approved by the Court. Fed. R. Civ. P. 23(e).
 6 Plaintiffs respectfully request that the Court certify the proposed Settlement Classes,
 7 preliminarily approve the Settlements, and appoint Plaintiffs' Interim Co-Lead Counsel as
 8 Settlement Class Counsel. *See A. Conte & H.B. Newberg, NEWBERG ON CLASS ACTIONS, §*
 9 11.25 (4th ed. 2002) ("Newberg") (outlining the steps of preliminary approval and class
 10 certification, notice, and a fairness hearing, which are required prior to final approval of a class
 11 settlement and are designed to safeguard the rights of absent class members).

12 **B. Standards for Settlement Approval**

13 "[T]here is an overriding public interest in settling and quieting litigation . . .
 14 particularly . . . in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th
 15 Cir. 1976); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The district
 16 court has substantial discretion in deciding to approve a class action settlement. *See Churchill*
 17 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Preliminary approval requires
 18 only that the terms of the proposed settlement fall within the "range of possible approval." *See*
 19 *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009); *In re*
 20 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Preliminary approval
 21 is appropriate when the terms are "sufficient to warrant public notice and a hearing." *See*
 22 *Manual for Complex Litigation*, Fourth, § 13.14 (2004) ("Manual").

23 Preliminary approval should be granted "[w]here the proposed settlement appears to be
 24 the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does
 25 not improperly grant preferential treatment to class representatives or segments of the class and
 26 falls within the range of possible approval." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176
 27 F.R.D. 99, 102 (S.D.N.Y. 1997). Application of these factors here supports preliminary
 28 approval of the Settlements. As shown below, the proposed Settlements are fair, reasonable,

1 and adequate. Therefore, the Court should allow notice of the Settlements to be disseminated
 2 to the Settlement Classes.

3 **C. The Proposed Settlements are Within the Range of Reasonableness**

4 The proposed Settlements are well within the reasonable range. First, the Settlements
 5 are entitled to “an initial presumption of fairness” because they resulted from arm’s length
 6 negotiations among experienced counsel. *See Newberg* § 11.41. These negotiations occurred
 7 over a span of years and collectively involved telephonic and face to face meetings; substantial
 8 correspondence; and the review of industry materials, documents produced by the Settling
 9 Defendants, and transactional data produced in this litigation. The negotiations were sharply
 10 contested and conducted in good faith. Lebsack Decl. ¶ 21. “‘Great weight’ is given to the
 11 recommendation of counsel, who are most closely acquainted with the facts of the underlying
 12 litigation.” *Nat’l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528
 13 (C.D. Cal. 2004). Thus, “the trial judge, absent fraud, collusion, or the like, should be hesitant
 14 to substitute its own judgment for that of counsel.” *Id.* (internal citation omitted). Plaintiffs’
 15 counsel believes that these Settlements are in the best interests of the Classes.

16 Second, the total Settlement Amount of \$22,252,000 is significant and compares
 17 favorably to other antitrust settlements reached prior to the close of discovery. *See, e.g., In re*
 18 *Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99 (approving settlements with all defendants
 19 totaling \$9,940,000). Moreover, the damages Plaintiffs suffered due to the Settling
 20 Defendants’ alleged conduct remain in the case, and, under joint and several liability, are
 21 recoverable from other Defendants. *See In re Auto. Refinishing Paint Antitrust Litig.*, MDL
 22 1426, 2003 WL 23316645, at *2 (E.D. Pa. Sept. 5, 2003) (preliminarily approving settlement
 23 agreement because, *inter alia*, “this settlement does not affect the joint and several liability of
 24 the remaining Defendants in this alleged conspiracy”).

25 Third, the Settling Defendants must provide significant cooperation to Plaintiffs in
 26 pursuing this case against the non-settling Defendants, including attorney proffers and
 27 making witnesses available for interviews with personal knowledge relating to the
 28 allegations of conspiratorial conduct in Plaintiffs’ SAC. *See Section III.B, supra.* “The

1 provision of such assistance is a substantial benefit to the classes and strongly militates
 2 toward approval of the Settlement Agreement.” *In re Linerboard Antitrust Litig.*, 292 F.
 3 Supp. 2d 631, 643 (E.D. Pa. 2003). This cooperation will save time, reduce costs, and
 4 provide access to information regarding the transpacific air passenger conspiracy that might
 5 otherwise not be available to Plaintiffs. *See In re Mid-Atl. Toyota Antitrust Litig.*, 564 F.
 6 Supp. 1379, 1386 (D. Md. 1983) (finding a defendant’s agreement not to contest provision
 7 of certain discovery “is an appropriate factor for a court to consider in approving a
 8 settlement”); *In re Corrugated Container Antitrust Litig.*, M.D.L. 310, 1981 WL 2093, at *16
 9 (S.D. Tex. June 4, 1981), *aff’d*, 659 F.2d 1322 (5th Cir. 1981) (finding that “[t]he cooperation
 10 clauses constituted a substantial benefit to the class.”).

11 Finally, the Settlements will not adversely affect the remainder of the case. These
 12 Settlements preserve Plaintiffs’ right to litigate against non-settling Defendants for the entire
 13 amount of Plaintiffs’ damages based on joint and several liability. Lebsock Decl. ¶ 22. In fact,
 14 these Settlements may aid in the ultimate resolution of this case. “In complex litigation with a
 15 plaintiff class, ‘partial settlements often play a vital role in resolving class actions.’” *Agretti v.*
 16 *ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (internal quotation omitted).

17 For these reasons, the proposed Settlements meet the judicially established criteria for
 18 class action settlements and warrant notice of their terms to the members of the Classes.

19 **V. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT
 20 CLASSES**

21 The Court should provisionally certify the Settlement Classes contemplated by the
 22 Settlement Agreements. It is well-established that price-fixing actions like this are appropriate
 23 for class certification. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291
 24 (N.D. Cal. 2010) (“LCD”); *In re Static Random Access (SRAM) Antitrust Litig.*, C0701819CW,
 25 2008 WL 4447592 (N.D. Cal. Sept. 29, 2008); *In re Dynamic Random Access Memory (DRAM)*
 26 *Antitrust Litig.*, M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006) (“DRAM”); *In re*
 27 *Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) (“Rubber Chems.”).

28 Federal Rule of Civil Procedure 23 provides that a court should certify a class action

1 where, as here, Plaintiffs satisfy the prerequisites of Rule 23(a) (numerosity, commonality,
 2 typicality, and adequacy) and 23(b) (predominance and superiority).⁸ This does not involve
 3 determination of whether Plaintiffs will ultimately prevail on the substantive merits of their
 4 claims. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974); *see also Blackie v. Barrack*,
 5 524 F.2d 891, 901 (9th Cir. 1975) (finding that on class certification motion, plaintiffs'
 6 substantive allegations are accepted as true); *Rubber Chems.*, 232 F.R.D. at 350 (same). The
 7 only issue is whether Plaintiffs satisfy the Rule 23 requirements. *Eisen*, 417 U.S. at 178.

8 **A. The Proposed Settlement Classes Satisfy Rule 23(a)**

9 **1. The Classes are so numerous that joinder is impracticable.**

10 The first requirement for maintaining a class action is that its members are so numerous
 11 that joinder would be impracticable. Fed. R. Civ. P. 23(a)(1). Courts have generally found that
 12 the numerosity requirement is satisfied when class members exceed forty. *Newberg* § 18:4; *Or.*
 13 *Laborers-Emps. Health & Welfare Trust Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 372-73
 14 (D. Or. 1998). Geographic dispersal of plaintiffs may also support a finding that joinder is
 15 “impracticable.” *Rubber Chems.*, 232 F.R.D. at 350-51; *see also LCD*, 267 F.R.D. at 300
 16 (stating that given the nature of the LCD market, “common sense dictates that joinder would be
 17 impracticable.”). Here, each Settlement Class consists of hundreds of thousands of members
 18 who purchased qualifying airfare involving at least one flight segment between the United
 19 States and Asia/Oceania. The proposed Settlement Classes satisfy the numerosity requirement.

20 **2. This case involves common questions of law and fact.**

21 The second prerequisite to class certification is the existence of “questions of law or fact
 22 common to the class.” Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has made clear that the
 23 commonality requirement is to be “construed permissively.” *Hanlon v. Chrysler Corp.*, 150
 24 F.3d 1011, 1019 (9th Cir. 1998). Commonality is satisfied by the existence of a single common
 25 issue. *Blackie*, 524 F.2d at 901. “Courts consistently have held that the very nature of a

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⁸ Rule 23(b)(3)’s “manageability” requirements need not be satisfied in order to certify a settlement class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (stating that when “[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.”).

1 conspiracy antitrust action compels a finding that common questions of law and fact exist.”
 2 *Rubber Chems.*, 232 F.R.D. at 351 (internal citation omitted). Here, all class members share
 3 common questions of law and fact that revolve around the existence, scope, effectiveness, and
 4 implementation of Defendants’ conspiracy, and that are central to each class members’ claims.
 5 Similar questions have satisfied the commonality requirement in antitrust class actions in this
 6 District. *LCD*, 267 F.R.D. at 300 (stating “the very nature of a conspiracy antitrust action
 7 compels a finding that common questions of law and fact exist”) (citing *Rubber Chems.*, 232
 8 F.R.D. at 351; *DRAM*, 2006 WL 1530166, at *3).

9 **3. Representative Plaintiffs’ claims are typical of the claims of the Classes.**

10 “Under [Rule 23]’s permissive standards, representative claims are ‘typical’ if they are
 11 reasonably co-extensive with those of absent class members; they need not be substantially
 12 identical.” *Hanlon*, 150 F.3d at 1020. “Generally, the class representatives ‘must be part of
 13 the class and possess the same interest and suffer the same injury as the class members.’”
 14 *LCD*, 267 F.R.D. at 300 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

15 Typicality is easily satisfied in horizontal price-fixing cases because “where[] it is
 16 alleged that the defendants engaged in a common scheme relative to all members of the class,
 17 there is a strong assumption that the claims of the representative parties will be typical of the
 18 absent class members.” *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss.
 19 1993); *In re Citric Acid Antitrust Litig.*, No. 95-1092, 1996 WL 655791, at *3 (N.D. Cal. Oct.
 20 2, 1996) (“*Citric Acid*”). As such, factual differences among individual transactions or in the
 21 amount of damages do not undermine typicality, so long as the damages suffered by Plaintiffs
 22 and the Classes arise from the purchase of products affected by the conspiracy. *See Armstrong*
 23 *v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001); *DRAM*, 2006 WL 1530166, at *33. Here,
 24 Plaintiffs assert the same claims on behalf of themselves and the proposed Classes—that they
 25 purchased air passenger tickets from Defendants and were overcharged due to the antitrust
 26 conspiracy between the Settling Defendants and their co-conspirators. Therefore, Plaintiffs’
 27 claims are typical of the claims of the other class members, and certification is appropriate.

28 **4. Representative Plaintiffs will fairly and adequately represent the interests**

of the Classes, and should be appointed as Class Representatives.

2 A representative plaintiff is an adequate representative of the class if he or she: (1) does
3 not have any interests antagonistic to or in conflict with the interests of the class; and (2) is
4 represented by qualified counsel who will vigorously prosecute the class's interests. *Hanlon*,
5 150 F.3d at 1020. Here, representative Plaintiffs satisfy both of these requirements. The
6 interests of Plaintiffs and Class members are aligned because they all suffered similar injury in
7 the form of higher airline ticket prices for travel from the United States to Asia/Oceania due to
8 Defendants' conspiracy, and all seek the same relief. Plaintiffs understand the allegations in
9 this case, and have reviewed pleadings, responded to discovery, and produced the documents
10 requested. Lebsock Decl. ¶ 24. They have been, or soon will be, deposed. *Id.* By proving
11 their own claims, Plaintiffs will necessarily prove the claims of their fellow Class members; as
12 such they should be named as Class Representatives for the Settlement Classes.

13 Further, Plaintiffs are represented by highly qualified counsel. Interim Co-Lead Counsel
14 have successfully prosecuted numerous antitrust class actions throughout the United States, and
15 are committed to vigorously prosecuting this action on behalf of the Classes. They have
16 undertaken the responsibilities assigned by the Court and have directed the efforts of other
17 Plaintiffs' counsel. Counsel's prosecution of this case, and indeed, these Settlements, amply
18 demonstrate their diligence and competence. Therefore, the requirements of Rule 23(a)(4) are
19 satisfied.

B. The Proposed Settlement Classes Satisfy the Requirements of Rule 23(b)(3)

1. Common questions of law or fact predominate over individual questions.

22 “Courts have frequently found that whether a price-fixing conspiracy exists is a
23 common question that predominates over other issues because proof of an alleged conspiracy
24 will focus on defendants’ conduct and not on the conduct of individual class members.” *LCD*,
25 267 F.R.D. at 310. Courts have held that this issue alone is sufficient to satisfy the
26 predominance requirement. *See, e.g., In re Static Random Access Memory (SRAM) Antitrust*
27 *Litig.*, 264 F.R.D. 603, 612-614 (N.D. Cal. 2009) (“SRAM”); *Rubber Chems.*, 232 F.R.D. at
28 353; *Citric Acid*, 1996 WL 655791, at *8. Therefore, common issues relating to the existence

1 and effect of the alleged conspiracy on air passenger ticket prices for travel from the United
 2 States to Asia/Oceania predominate over any questions arguably affecting individual class
 3 members. Proof of how Defendants implemented and enforced their conspiracy will also be
 4 common to the Classes and predicated on establishing the existence of Defendants' antitrust
 5 conspiracy. These overriding issues satisfy the predominance requirement.⁹

6 **2. A class action is superior to other available methods for the fair and
 7 efficient adjudication of this case.**

8 “[I]f common questions are found to predominate in an antitrust action, then courts
 9 generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied.” Wright,
 10 Miller & Kane, *Federal Practice and Procedure: Civil Procedure* § 1781 at 254-55 (3d ed.
 11 2004). That is because in price-fixing cases, “the damages of individual indirect purchasers are
 12 likely to be too small to justify litigation, but a class action would offer those with small claims
 13 the opportunity for meaningful redress.” *SRAM*, 264 F.R.D. at 615. Here, a class action is
 14 superior to individual litigation because “[n]umerous individual actions would be expensive
 15 and time-consuming and would create the danger of conflicting decisions as to persons
 16 similarly situated.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

17 Further, requiring individual cases would deprive many class members of any practical
 18 means of redress. Because prosecution of an antitrust conspiracy against economically
 19 powerful defendants is difficult and expensive, most class members would be effectively
 20 foreclosed from pursuing their claims absent class certification. *See Hanlon*, 150 F.3d at 1023
 21 (“Many claims [that] could not be successfully asserted individually . . . would not only
 22 unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs.”); *see also SRAM*, 264 F.R.D. at 615. Moreover, separate adjudication of claims creates a risk of
 23 inconsistent rulings, which further favors class treatment. Therefore, a class action is the
 24 superior method of adjudicating the claims raised in this case.

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 27 ⁹ Potential individualized damages do not defeat predominance. *See, e.g., In re Visa Check/Master Money Antitrust*

28 *Litig.*, 280 F.3d 124, 138 (2d Cir. 2001) (citing and discussing cases); *DRAM*, 2006 WL 1530166, at *47 (holding that courts may certify classes “regardless of whether some members of the class negotiated price individually, or whether—as here—differences among product type, customer class, and method of purchase existed.”).

1 **C. The Court Should Appoint Plaintiffs' Interim Co-Lead Counsel as**
 2 **Settlement Class Counsel**

3 “An order certifying a class action . . . must appoint class counsel under Rule 23(g).”
 4 Rule 23(c)(1)(B). Courts must consider (i) counsels’ work in identifying or investigating
 5 claims; (ii) counsel’s experience in handling the types of claims asserted; (iii) counsel’s
 6 knowledge of applicable law; and (iv) the resources counsel will commit to representing the
 7 class. Fed. R. Civ. P. 23(g)(1)(A). After considering competing motions, the Court appointed
 8 Cotchett, Pitre & McCarthy and Hausfeld LLP as Interim Co-Lead Class Counsel. *See* Dkt.
 9 Nos. 130, 175. “Class counsel’s competency is presumed absent specific proof to the contrary
 10 by defendants.” *Farley v. Baird, Patrick & Co., Inc.*, 90 CIV. 2168 (MBM), 1992 WL 321632,
 11 at *5 (S.D.N.Y. Oct. 28, 1992). Interim Co-Lead Counsel are willing and able to vigorously
 12 prosecute this action and to devote all necessary resources. The work they have done since
 13 their appointment provides substantial basis for the Court’s earlier finding that they satisfy Rule
 14 23(g)’s criteria. Accordingly, Cotchett, Pitre & McCarthy and Hausfeld LLP should be
 15 appointed as Settlement Class Counsel for purposes of these Settlements.

16 **VI. PROPOSED PLAN OF NOTICE AND PLAN OF ALLOCATION**

17 Rule 23(e)(1) states that, “[t]he court must direct notice in a reasonable manner to all
 18 class members who would be bound by a proposed settlement, voluntary dismissal, or
 19 compromise.” Plaintiffs’ counsel will submit a notice plan to the Court in the near future.
 20 Plaintiffs propose that distribution of Settlement funds be deferred until the termination of the
 21 case, when there may be additional settlements from remaining Defendants to distribute, and
 22 because piecemeal distribution is expensive, time-consuming, and likely to cause confusion to
 23 members of the Classes. Deferring allocation of settlement funds is a common practice in cases
 24 where claims against other defendants remain. *See Manual* § 21.651. Although distribution
 25 will be deferred, Plaintiffs propose notifying the Classes that distribution of funds will be made
 26 on a *pro rata* basis. A plan of allocation that compensates members based on the type and
 27 extent of their injuries is generally considered reasonable. *In re Citric Acid Antitrust Litig.*, 145
 28 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001).

1 **VII. NOTICE COSTS, LITIGATION EXPENSES, AND ATTORNEYS' FEES**

2 Plaintiffs also move for the provisional creation of a litigation expense fund of up to \$3
 3 million for the reimbursement of out-of-pocket expenses incurred to date, and for payment of
 4 current and future out-of-pocket expenses that will be incurred, with any unused funds being
 5 disbursed to the Classes. Such litigation funds have been approved in other class actions. *See,*
 6 *e.g.*, *Newby v. Enron Corp.*, 394 F.3d 296, 303 (5th Cir. 2004) (affirming approval of class
 7 settlement with \$15 million of settlement proceeds going to a litigation expense fund); *In re*
 8 *Cal. Micro Devices Sec. Litig.*, 965 F. Supp. 1327, 1337 (N.D. Cal. 1997) (approving a \$1.5
 9 million litigation fund “[b]ecause the remainder of the case appears to have potential value for
 10 the class”). Plaintiffs’ litigation fund request will be fully explained in the proposed notice
 11 program.

12 Finally, Plaintiffs’ counsel do not seek attorneys’ fees at this time, but will seek a fee
 13 award in conjunction with the approval of future settlements or at some other later date.
 14 Plaintiffs’ counsels’ fee request will not exceed one-third of the amount of the Settlements.

15 **VIII. CONCLUSION**

16 Based on the foregoing, Plaintiffs respectfully request that the Court: (1) grant
 17 preliminary approval of the Settlement Agreements; (2) certify the Settlement Classes; and (3)
 18 appoint Plaintiffs’ Interim Co-Lead Counsel as Settlement Class Counsel and named Plaintiffs
 19 as Class Representatives for the Settlement Classes.

20 Dated: June 25, 2014

21 Respectfully submitted,

22 /s/Steven N. Williams
 23 Joseph W. Cotchett (36324)
 jcotchett@cpmlegal.com
 24 Pete N. McCloskey (SBN 024541)
 pmccloskey@cpmlegal.com
 Steven N. Williams (175489)
 swilliams@cpmlegal.com
 25 **COTCHETT, PITRE & McCARTHY**
 San Francisco Airport Office Center
 840 Malcolm Road, Suite 200
 Burlingame, CA 94010
 Telephone: (650) 697-6000
 Facsimile: (650) 697-0577

26 /s/Christopher L. Lebsack
 27 Michael D. Hausfeld
 mhausfeld@hausfeldllp.com
 Seth R. Gassman
 sgassman@hausfeldllp.com
HAUSFELD LLP
 1700 K Street, Suite 650
 Washington, D.C. 20006
 Telephone: (202) 540-7200
 Facsimile: (202) 540-7201
 28 Michael P. Lehmann (77152)

1 mlehmann@hausfeldllp.com
2 Christopher Lebsock (184546)
3 clebsock@hausfeldllp.com
4 **HAUSFELD LLP**
5 44 Montgomery Street
6 San Francisco, CA 94111
7 Telephone: (415) 633-1908
8 Facsimile: (415) 358-4980

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Interim Co-Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Christopher Lebsock, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner at the law firm of HAUSFELD LLP, and my office is located at 44 Montgomery Street, Suite 3400, San Francisco, California 94104.

On June 25, 2014 I caused to be served a true and correct copy of the following:

- 1) PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS JAPAN AIRLINES INTERNATIONAL COMPANY, LTD; SOCIETE AIR FRANCE; VIETNAM AIRLINES COMPANY, LTD; THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY, LTD; AND MALAYSIAN AIRLINE SYSTEMS BERHAD; AND MEMORANDUM IN SUPPORT THEREOF;
- 2) DECLARATION OF CHRISTOPHER L. LEBSOCK IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS JAPAN AIRLINES INTERNATIONAL COMPANY, LTD; SOCIETE AIR FRANCE; VIETNAM AIRLINES COMPANY, LTD; THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY, LTD; AND MALAYSIAN AIRLINE SYSTEMS BERHAD;
- 3) [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS JAPAN AIRLINES INTERNATIONAL COMPANY, LTD; SOCIETE AIR FRANCE; VIETNAM AIRLINES COMPANY, LTD; THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY, LTD; AND MALAYSIAN AIRLINE SYSTEMS BERHAD;
- 4) CERTIFICATE OF SERVICE

with the Clerk of the Court using the Official Court Electronic Document Filing System which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 25, 2014 at San Francisco, California.

/s/ Christopher Lebsock
Christopher Lebsock